contract void and should have no bearing on the latter decision. The contract in both cases was not void but voidable. It was voidable, because the relation of master and servant existed by virtue of one party performing valuable services, which were accepted and paid for by the other.[4] The company could terminate the contract when the deception was discovered, but until one party or the other put an end to the relation, it would continue to exist. It is true the minor falsely stated his age, but a false statement to any other material matter would have had the same effect upon the contract and relation created between the minor and the company. The company might fixt the age limit at tweny-five years, and if so, a misssatement by a man of twenty-one years, regarding his age, would not make him a trespasser and wrongdoer on the properties of the company. If marriage were a requiement, a misstatement by an applicant for employment, that he was married when in reality he was single, would not render him a trespasser. The case is the same with a railroad as any corporation or person.[5] A farmer might state that he would employ no one under twenty-one, yet a farmhand who gained employment by falsely stating he was over twenty-one would not be a trespasser on the farmer's lands. Judge Sayre distinctly says the contract is void, and yet admits that had the minor continued in the employ of the company until after he had reached the age of twenty-one, he would no longer have been a trespasser, and by this admission he shows the fallacy of his entire argument, for the minor by continuing in the employment of the company after his majority, nevertheless is still working under the same contract that he obtained before his majority by his misrepresentations. This same contract exists both before and after his majority and is voidable at the option of the company but not void, for the only possible difference which can be created by his arrival at majority is that no injury could thereafter result to the company from his deception.

It would therefore appear that the court was correct in holding that a minor who obtained employment by misstating his age, in violation of the rules formulated by his employer and was subsequently injured by his employer's negligence, either before or after reaching majority, is entitled to compensation if the said negligence was the direct and proximate cause of the injury and his own immaturity in no way contributed to the injury.

C. S. H.

UNCERTAIN DAMAGES.—Speculative, contingent, uncertain, conjectural, remote damages are terms loosely used to cover what may fairly be said to be really two questions. As the rule is different in each of these, the ambiguity is unfortunate. There would

[4] Luper v. A. T. S. Fe R. R., 81 Kans. 585.

[5] R. R. v. Baldwin, 19 Ohio C. C. 338.

be less apparent confusion in the cases if a terminology were used which distinguished between the two.

Speculative damages as a problem comprises the great middle ground between two well-defined limits. At the one extremity we have the cases where no damage has accrued whatsoever. At the other are those cases where there is no doubt of the existence of injury and the amount of the damages is quite certain, perhaps liquidated in advance, but at least capable of being ascertained by a merely mathematical process or by the application of definite standards. Between these two extremes is the field of uncertainty shading gradually from the one limit to the other. However, an analysis of the decisions shows them to be resolvable into two definite classes. For the uncertainty of damages may be of two kinds,—uncertainty as to the value of the benefit or gain that, it is claimed, would have been realized but for the tortious act or breach of contract charged against the defendant; and uncertainty whether any such gain or benefit would be derived at all. It might be argued that these are one and the same thing. Of course absence of damage is a definite, namely, zero quantity of damage. However, there is a sufficient difference for the distinction to be made between a variability in plus amounts of damage and an uncertainty between plus and zero damage.

That some damage has accrued in a given case may be certain, and yet a valuation of it in terms of money impossible. When this impossibility is found by closer scrutiny to have been only apparent, and the damage to be computable by investigation of market values, cost of transportation, price of labor and the like, then we have a case of ascertainable damages closely approaching the limit where they are absolutely demonstrated.[1] Such a case is really not within the realm of speculative damage. But there are many cases where the existence of some damage is apparent, but where its amount cannot be reduced to a certainty even by the exercise of careful investigation and mathematical computation. Where a variety of ways of computing it are offered, the court will adopt the mode which is the more definite and certain though it may be at the same time admittedly the less adequate.[2] So, rather than that the jury should guess at the possible profits that might have been made with money or goods or land, the court will allow a compensation for the use of it during the period, for example, interest, hire and rent, which are averages that have been found by extended observation. In these cases, loss of profits although dependable in amount upon circumstances is reasonably certain, because the contingencies in the case do not go so far as to render uncertain the possibility of some profit. So in the case of an established business of non-precarious character, the chances being that it will go on as before, past profits may be adduced as evidence for the purpose of allowing the jury to form

[1] Masterton v. The Mayor of Brooklyn (1845), 7 Hill 62.

[2] Griffin v. Colver (1858), 16 N. Y. 489.

an approximation of future profits, as some courts have put it[3], or of the present worth of the future expectation, as others would have it[4].

When the contingencies present in a case are so increased and extend the limits of variability so far that there may be no loss at all, then there is the second kind of uncertainty, true contingent damages, where no recovery is allowed. For the question on the whole is how great and how many are the contingencies. The cases of crops allow recovery according to two different rules, because in some cases so many of the contingencies have been eliminated that uncertainty remains merely as to the amount of loss. A crop is grown of an inferior quality because of the defendant's breach. There the contingencies of the fertility of the land, of weather and season have been disposed of, the crop having been brought to maturity.[5]

In a recent English case[6], the contingencies upon which the alleged loss of profits depended were carefully enumerated. It was an action for the breach of a contract for the service of a celebrated stallion. Although the plaintiff could show the actual profits made on foals previously begotten of that sire, his recovery was nevertheless limited to nominal damages. While it was proven that the plaintiff's mare had been served by a less celebrated sire, there seems to have been in the case no evidence that she had foaled to him a healthy foal. If this had been shown the contingencies of the fertility or non-fertility of the mare would have been eliminated, and the case would have been in line with the crop cases above-mentioned. However, since it appeared absolutely uncertain whether there would have been a colt born of the union contracted for, the court correctly held that the case was not one of an "estimate of damages based on probabilities" but a "claim for damages of a totally problematical character."

In so far as it is based on the idea of contingencies, in line with the cases of the chance of winning a prize,[7] the decision is satisfactory. Less convincing is the applicability of passages quoted from Mayne on Damages.[8] That passage which would apportion the defendant's liability to the benefit he is to receive from the performance of the contract, is limited in application to the normal sale of commodities and is at best doubtful. Nor is there greater merit in the other suggeston, at least where it is obvious as here that the entire object of the contract, to obtain a profit out of the transaction, must

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[3] Allison v. Chandler (1863), 11 Mich. 542.

[4] Goodhart v. R. R. (1896), 177 Pa. 1.

[5] Compare Wolcott v. Mount (1873), 36 N. J. L. 262, with Chicago v. Huenerbein (1877), 85 Ill. 594.

[6] Sapwell v. Bass (1910), 2 K. B. 486.

[7] Erle, J. (Patteson, J., *contra*), in Watson v. Ambergate, etc., Ry., 15 Jur. 448. See accord Adams Express Co. v. Egbert (1860), 36 Pa. 360.

[8] Mayne on Damages, 8th Ed., p. 11 and p. 70.

have been equally within the defendant's contemplation as within the plaintiff's. The problem is really a more elemental one than any application of the rule of Hadley v. Baxendale.[9] It rather concerns the fundamental burden placed upon the plaintiff of proving damage which is precedent to his right of recovery of more than nominal damages.

S. L. H.

PARTNERSHIP—RIGHTS OF CREDITORS IN SEPARATE PROPERTY USED AS PROPERTY OF A PARTNERSHIP BY HOLDING OUT.—A discussion of this question is suggested by a case recently decided by the Supreme Court of Appeals of Virginia, Johnson v. Williams, *et al.*[1] Should the firm creditors have a priority in the property used as firm property is the issue presented. This involves the application of the rule finally settled in England by Lord Eldon, that the joint fund should first be distributed among the joint creditors, the separate property first among the separate creditors, each class having a right in any surplus of the other. Some courts have decided it in the negative, others in the affirmative. A Massachusetts decision, Broadway National Bank v. Wood,[2] is illustrative of the former, and a Wisconsin case, Thayer v. Humphrey,[3] of the latter. We will consider the argument for each separately.

The reasons for denying a priority to firm creditors in separate property used as firm property by an ostensible firm may be briefly stated as follows: This priority exists only by virtue of the equity existing between partners, *inter se*. That is, each partner has a right to insist that firm assets shall be used to pay firm debts. This arises from the agreement of partnership. Parsons,[4] in his work on partnership denies this and insists that it arises from the separate liability incurred as a result of being a partner. The cases do not bear him out in this view, and we can dismiss it without further notice. In the case of an ostensible partnership there is no agreement, and hence nothing out of which an equity can flow. The firm creditors have no claim to priority of their own strength, and if they have no derivative claim for want of a partner's equity, they can have no priority. There are no cases which attack this reasoning. Its strength lies in its simplicity. One other point is taken up, estoppel. The Virginia court says, while the person held out is estopped to deny his liability to creditors as a partner, between the partners themselves there is no such estoppel. To quote the language of Judge Buchanan, "There can be no equitable estoppel between parties where neither has been

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[9] 9 Ex. 341.

[1] 68 S. E. 410 (Va. 1910).

[2] 165 Mass. 312 (1896).

[3] 91 Wis. 276 (1895).

[4] Parsons, Jas., on Partnership (2nd edition 1899), §109, at page 511.